

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

David McGee,,  
Plaintiff,

v.

File No. 1:10-cv-11-jgm-jmc

Andrew Pallito, Robert Hofmann,  
Kurt Kuehl, Robert McDougall,  
Marie Salem, Robert Kupec,  
Kevin Oddy, Phil Fitzpatrick,  
Brian Reed, Cindy Modiano,  
Mary Ellen Cross, Richard Byrne,  
David Talcott, Greg Hale,  
Tim Harrington, Philip Brochu,  
Phillip Quijano, Joseph Sylvestri,  
Marshall Rich, David Martinson,  
Michael Bellizzi, Scott Morley,  
Anita Carbonell, Ellen McWard,  
Dominic Domato, Mark Potanas,  
Christina Granger, James Kamel,  
Joshua Rutherford, Michael Arace,  
James Edwards, Monique Sullivan,  
Correctional Officer Camp,  
Delores Burroughs-Biron, M.D.,  
Nurse Manager Doe, Nurse(s) Doe,  
Prison Health Services, Inc., and  
Correctional Officer Michael Simonds,  
a/k/a Simmons,  
Respondents.

**ORDER**

The Magistrate Judge's Report and Recommendation was filed August 3, 2011.  
(Doc. 84.) After de novo review and over objection, the Report and Recommendation  
is AFFIRMED, APPROVED and ADOPTED. See 28 U.S.C. § 636(b)(1).

The State Defendants' motion to dismiss (Doc. 58) is GRANTED in part and  
DENIED in part. Counts 1, 2, 4, 6, 7 and 9 are DISMISSED in their entirety. Count 3 is  
DISMISSED with the exception of McGee's claims of inadequate winter clothing and the

claims related to his sweatpants. Defendant Martinson is DISMISSED from Count 3 for lack of personal involvement.

As to Count 5, Defendant Salem is DISMISSED insofar as McGee is seeking damages. As to Count 12, Defendants Carbonell, Kamel, Kupec, Pallito and Salem are DISMISSED, again to the extent McGee is seeking damages. As to Count 8, Defendants Kupec, Pallito and Carbonell are DISMISSED from McGee's claims for damages; and in Count 13, Defendants Kupec, Oddy, Potanas and Salem are dismissed from any claims for damages. All state law claims are DISMISSED. The State Defendants' motion to dismiss is otherwise DENIED.

The motion to dismiss submitted by Defendant Prison Health Services, Inc. (Doc. 62), which pertains only to Count 11 and adopts the State Defendants' arguments, is DENIED.

This matter is returned to Magistrate Judge John M. Conroy for further proceedings.

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 15<sup>th</sup> day of December, 2011.

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/s/ J. Garvan Murtha  
Honorable J. Garvan Murtha  
United States District Judge